United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1009

To be argued by
PAUL E. COFFEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1009

UNITED STATES OF AMERICA,
Appellee,

—v.—

EDWARD V. MASE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Rule 5.1 Preliminary Examination.

(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

United States Code

18 U.S.C. § 891. Definitions and Rules of Construction.

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or

claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

18 U.S.C. § 894. COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS.

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

United States Court of Appeals

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UNITED STATES OF AMERICA,

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—v.—

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Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On June 22, 1976 the defendant, Edward V. Mase, was arrested by special agents of the Federal Bureau of Investigation at the Branford, Connecticut residence of Paul Dwyer, on the basis that Mase had committed a violation of Title 18, United States Code, Section 894 (prohibiting use of extortionate means to collect a gambling debt) in their presence. Mase was presented to the Honorable Arthur Latimer, United States Magistrate, in New Haven, Connecticut the following day. Magistrate Latimer released Mase on bond and set July 12, 1976 as the date for the preliminary hearing. On July 12, 1976 the United States declined to go forward, at which time Magistrate Latimer dismissed the complaint filed against Mase and released him. On July 14, 1976 a federal grand jury in New Haven indicted Mase and a

co-defendant Edward R. Gianotti for violations of Section 894, Title 18, United States Code, which prohibits the use of extortionate threats to collect extensions of credit, and conspiracies to do so. The defendants filed motions to dismiss the indictment and suppress evidence, which were denied, and for discovery and a bill of particulars, which were granted in part, by the Honorable Jon O. Newman, District Judge. The case against the two defendants was severed and the jury in the case against Mase was picked on September 27, 1976 in New Haven. Evidence was not scheduled to begin on October 5, 1976 because of previously scheduled commitments of counsel for both sides for the remainder of the week. On September 28, 1976 co-defendant, Edward R. Gianotti, entered a plea of guilty to Count Three, which charged a substantive violation under Section 894. On October 5, 1976, before any evidence was presented against Mase, Judge Newman declared a mistrial after learning that some of the jurors had read of Gianotti's change of plea in the newspaper. On November 8, 1976 at the Hartford seat of court, trial against Mase began with the selection of a jury and presentation of evidence. On November 10, 1976 the jury convicted Mase on the substantive count and reported itself deadlocked on the conspiracy count. Judge Newman declared a mistrial of that count and ordered Mase committed after finding that he constituted a danger to the community.

On December 6, 1976—the scheduled sentencing date —Judge Newman gave Mase additional time to answer charges contained in the pre-sentence report. On December 14, 1976, Judge Newman sentenced Mase to ten years imprisonment. The United States subsequently moved to dismiss the conspiracy count. The defendant's notice of appeal was timely filed.

Statement of the Facts[1]

Paul Dwyer, a self-employed tax accountant in Branford, Connecticut, met one Edward Papagoda in August, 1972 and struck up a friendship. Papagoda owned a gas station in Branford. For a period of five weeks in August and September, 1972 Dwyer placed wagers on baseball games with Papagoda and lost approximately $1,250 (Tr. 130). Dwyer paid about $285 of this debt, leaving the balance just under $1,000 (Tr. 131). In early 1973 Dwyer performed some tax work for Papagoda for which he was reimbursed in part by free gasoline. In the closing months of 1974 Dwyer again engaged in gambling with Papagoda, this time as a commission writer of wagers placed by bettors with Dwyer, who accepted the wagers for Papagoda (Tr. 133). By 1974, Dwyer was under the impression that his earlier debt to Papagoda had been forgiven (Tr. 133). Two of the bettors wagering in 1974 with Dwyer collectively lost $1,200, for which Papagoda held Dwyer accountable when they failed to pay (Tr. 137). In this disputed state, the Papagoda/Dwyer relationship remained through May, 1976.

Dwyer had also done some tax work in the past for Edward Gianotti (Tr. 138). In May, 1976 Gianotti approached Dwyer and asked if Dwyer would be interested in taking wagers for one Richard Murphy using Gianotti as an intermediary (Tr. 141-142). Dwyer agreed and began a four week wagering period himself with Gianotti on May 19, 1976 (Tr. 143). By June 4, 1976 Gianotti was ahead $1,600, but had not been paid. On Saturday, June 5, 1976, Dwyer wagered and lost approximately

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[1] This Statement will relate to the evidence of the offense. Facts and evidence relevant to issues such as pre-trial hearings will be set forth in the argument on those issues. "Tr. . . ." references will be to the transcript of the trial.

$1,600 with Gianotti (Tr. 146), which wiped out his unpaid winnings. On Sunday, June 6 Dwyer wagered and lost another $4,000 in wagers (Tr. 146). No money passed hands between the two men as Dwyer went from the black into the red. On June 8, 1976 Dwyer told Gianotti he needed time to pay; Gianotti responded that some "serious people" were tied into the matter and Dwyer had better make some fast arrangements (Tr. 148). On June 15, Dwyer found a note in his office directing him to call Edward Mase at a given telephone number (Tr. 149). Dwyer, who had never met Mase (Tr. 150), called Mase, who told Dwyer he wanted to meet him the next day, (Wednesday). A meeting was arranged for Thursday, June 17, at Beefsteak Charlie's Restaurant (Tr. 152). On Thursday Mase and Dwyer met in Dwyer's car outside the restaurant. Mase displayed a piece of paper indicating "$4,000 Eddie G." and "Eddie P. $3,385" (Tr. 154). Mase said he'd been looking for Dwyer for two and a half years, that Dwyer would have to do something about the tab, and that if Dwyer went to the police he (Mase) would break every bone in Dwyer's body. Mase insisted on a payment by Friday, June 18. That night, Dwyer called Gianotti, related what had occurred, and said he might buy a gun or go to the police. Gianotti advised against this and indicated he would try to convince Mase to give Dwyer more time (Tr. 156).

The next day, Friday, June 18, 1976, Dwyer and his girlfriend, Melinda Ramsby, stopped by the Roadhouse Inn in Branford for a drink. Mase and Gianotti unexpectedly arrived on the scene and took Dwyer into a back room (Tr. 159). Mase repeated his threat to beat up Dwyer and said that if Dwyer bought a gun he'd make Dwyer eat it (Tr. 160). Mase then threatened to assault Gianotti as well and demanded $1,000 by the following Tuesday plus $500 a week thereafter. Once the Gianotti

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Dwyer complained that everybody

fendant's Brief, page 50 for a transcript

he knew was broke, Mase asked what if Dwyer's mother knew that Dwyer was going to get killed. Much to the surprise of everyone, Mase, who was walking around and inspecting the premises during this conversation, then opened the door behind which the agents were poised. Mase was placed under arrest.

As luck would have it, Gianotti, unaware of Mase's arrest and detention, telephoned Dwyer shortly thereafter. In this recorded conversation (Exhibit 2),[3] which is lengthy, Dwyer advised Gianotti that he had not paid Mase. Gianotti expressed horror at this nonpayment and further described "Joe Rubin", whom Dwyer described as having accompanied Mase to his office, as a maniac and a muscle man. Gianotti advised Dwyer not to run "from them" and said that he would try to contact Mase and arrange for easier payments. Gianotti advised Dwyer that if "they" allowed Dwyer to make "juice" payments and he defaulted, that he (Dwyer) would get killed. After describing the various options Dwyer had, one of which was to pay $400 a week in penalty payments without reducing either the principal or interest, Gianotti warned Dwyer to make some arrangements because, as matters presently stood, he was definitely going to get hurt.

I.

The Government's Decision Not To Proceed At The Preliminary Hearing Did Not Violate The Appellant's Constitutional Or Statutory Rights.

As previously noted, Mase was arrested on June 22, 1976 by agents of the Federal Bureau of Investigation during the commission of the offense. Since there was

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[3] See page 54 of Appendix to Defendant's Brief for a transcript thereof.

no indictment, the United States Magistrate scheduled, under Rule 5.1, F.R.Cr.P., a preliminary hearing on July 12, 1976.[4] On July 12, 1976 the government announced that it had decided not to go forward, despite the consequence that the outstanding complaint against Mase would be dismissed (PH 5). Although the government had not planned to call Paul Dwyer in any event as a witness, the defense had subpoenaed him. As Mase correctly surmises in his Brief, the government did not proceed at the hearing because to do so might have disclosed the nature and extent of Dwyer's confidential cooperation in unrelated criminal investigations at a time when the government was attempting to evaluate whether further disclosure of Dwyer as a government witness was worth the potential danger to him.[5] In order to rebut any defense claim that the government's decision not to proceed was made solely to deprive him of the probable cause that the *government* intended to submit, the prosecution at the hearing listed what that evidence was and made it available for inspection to the defense (PH 6). When the Magistrate dismissed the complaint against Mase, therefore, and released him from bond,[6] the defendant had been deprived only of information which he would have elicited from his own "witness", i.e. Dwyer.

Rule 5.1(a), F.R.Cr.P., by its express terms provides that a preliminary hearing is for the purpose of determining if probable cause exists to conclude that the de-

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[4] References to the preliminary hearing transcript, which is part of the record on appeal, shall be (PH).

[5] In this regard, the prosecution filed a sealed affidavit with Judge Newman explaining the considerations facing the government as of the hearing date and setting out specifically the previous cases in which Dwyer had cooperated. A copy of this sealed affidavit is part of the record on appeal.

[6] The government offered not to renew a bond request against Mase if he was indicted thereafter.

fendant committed an offense, so that, if there is probable cause, the Magistrate can continue the defendant under process to the district court. Rule 5.1(b) specifically provides that the remedy available to a defendant where probable cause is not found is discharge from custody and dismissal of the complaint. Nothing more. The government is specifically empowered by the Rule in such a case to indict the defendant despite the dismissal. In *Sciortino* v. *Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), the petitioner sought a delay in a scheduled preliminary hearing because of absence of counsel. The United States indicated it would proceed to indict the petitioner in the event of a delay and then refuse to go forward with a preliminary hearing on the ground that the indictment removed the necessity of having one. Petitioner sought mandamus to require the hearing. This Court said:

> "There is nothing in the language or the history of Rule 5 to suggest that the preliminary examination has any purpose other than to afford a person arrested upon complaint an opportunity to challenge the existence of probable cause for detaining him or requiring bail." At p. 133.

This Court rejected the idea that the defendant has the right to use a Rule 5 hearing to conduct a discovery expedition, since discovery is independently provided by Rule 16, F.R.Cr.P., and held that an indictment eliminates the need for a preliminary examination. *Id.*[7] In the teeth of this decision defendant asserts that two cases, *Coleman* v. *Alabama*, 399 U.S. 1 (1970) and *United*

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[7] This Court reiterated this position in *United States* v. *Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972); Accord, *Robbins* v. *United States*, 476 F.2d 26, 32 (10th Cir. 1973); *United States* v. *Anderson*, 481 F.2d 685, 691 (4th Cir. 1973).

States v. *King*, 482 F.2d 768 (D.C. Cir. 1973) dictate a different result here. In *Coleman*, *supra*, however, the Supreme Court held, not surprisingly, that a preliminary hearing, when required under state law, is a critical stage to which the right to counsel attaches. We do not contend here that the government could have deprived Mase of his attorney's assistance at a preliminary hearing to the extent one was held. He certainly had such assistance on July 12, 1976. We contend simply that he obtained all that he was entitled to when the complaint was dismissed. And, in *United States* v. *King*, *supra*, a California court improperly restricted the right of cross-examination by a rape defendant of the victim and then proceeded to *bind him over* for further proceedings. In *King*, therefore, the preliminary hearing was improperly conducted, the result of which was the continued incarceration of the accused. The resulting prejudice was clear. Even so, *King* held that since the California authorities subsequently secured an indictment, the ordering of a preliminary hearing at that point was fruitless. The court concerned itself with remedial steps to insure that at trial the defendant had access to information he would have otherwise have obtained had the examination been properly conducted. King, at pp. 776-777 and fn. 65. In this vein Mase claims that the government's decision not to proceed intentionally deprived him of *Brady* material.[8] This bald claim is frivolous. First, Mase had not even been indicted as of July 12, 1976. Proceedings against him as of that date had hardly proceeded to the critical stage where he could contend that the government, in seeking to avoid disclosure of Dwyer's confidential cooperation in totally unrelated cases, was attempting to deprive him of a fair trial. Second, upon indictment two days later, the defendant

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[8] *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See* Defendant's Brief, at p. 9.

instantly had available to him the full panoply of disclosure under Rule 16 and under *Brady*, to which he fully availed himself. Third, the government's pre-trial affidavit filed with Judge Newman, wherein Dwyer's past cooperation was identified by case, can hardly be considered an attempt to hide this cooperation from impartial judicial scrutiny. And finally, apart from the fact that Mase sought by motion to obtain more specific details of this cooperation than the Court actually ordered disclosed, he admitted at trial that he had suffered no prejudice in preparing his cross-examination of Dwyer (Tr. 382-383). It became irrelevant, therefore, whether the defendant would have obtained information about Dwyer's cooperation at a preliminary examination had one been held.

II.

There Was No Improper Pre-Trial Publicity Generated By The Government; The Appellant Was Not Entitled To A Trial In New Haven County; The Jury As Selected Was Unbiased And Fair.

The government declined to proceed at the preliminary hearing on July 12, 1976 and indicated to the Magistrate it would present the Mase case to the grand jury the following day (PH 7). The preliminary hearing and its outcome was of course public knowledge. A New Haven reporter, Andrew Houlding, visited the federal courthouse over the next two days and inquired of the United States Attorney's Office on July 13, 1976 if an indictment had been returned.[9] (Hearing, p. 15). He was told that no

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[9] References to testimony and argument on a hearing held by Judge Newman on the publicity issue shall be "Hearing, p. . . .". A full transcript, dated September 30, 1976 is a part of the record on appeal.

indictment had been returned that day, but it was expected on the next, July 14, 1976 (Hearing, p. 15). Mase was no stranger to Houlding. In 1972, Houlding's newspaper reported Mase's state conviction for a firebombing in West Haven and on May 25, 1972, the newspaper described Mase and one Ceasar Canestri [10] as "important organized crime figures" in New Haven (Hearing, p. 25). Houlding's initial impression that Mase had alleged ties to organized crime came from the newspaper's morgue dating back to 1972, (Hearing, p. 24). When Mase was indicted on July 14, 1976 Houlding's articles described Mase and others as organized crime figures.[11] Houlding considered the Mase case, accordingly, as one involving organized crime. According to him, federal authorities gave him "reason to believe" that it was, as corroborated (as far as he was concerned) by the fact that the prosecution was brought by the Organized Crime Strike Force Office (Hearing, p. 26). At a hearing on pre-trial publicity, the defendant pressed Houlding to reveal the identity of his federal source that "confirmed" Mase's alleged organized crime ties. Houlding declined to do so, even though the government on two occasions itself asked him to disclose if such information came from anyone in the government associated with the case. In any event, the jury selected on September 27, 1976 to try Mase had not read these articles. Between September 27 and October 5, 1976, the date trial was scheduled to begin, co-defendant Gianotti entered a plea of guilty. Houlding wrote an article about this change of plea and referred in passing to Mase's reputed organized crime ties.[12]

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[10] Canestri, by the way, was the other individual along with Joseph Rubbo who accompanied Mase to Dwyer's home on June 22, 1976.

[11] *See* Defendant's Appendix, p. A37-40.

[12] *See* Defendant's Appendix, at p. A. 100-102.

Judge Newman conducted a voir dire of the jury [13] and discovered that three of the fourteen jurors [14] had read about the change of plea; one of the three misunderstood the change of plea as Mase's (Hearing, p. 128). The defense conceded that the change of plea article was not generated by the government. (*Id.*, at p. 132.) Having held the voir dire, Judge Newman made it "very clear" that the only reason he was inclined to grant a mistrial was because three jurors read of the Gianotti plea. (*Id.*, at p. 153.) He declared a mistrial and moved the case to Hartford for trial on October 8, 1976. Judge Newman stated, despite the continued claims of the defendant, that the only ill-advised comment by the government that played any role in the pre-trial publicity was the comment that an indictment was anticipated and further observed that even that remark was generated by the press. (Tr. 25).

It should be noted first that Mase apparently contends that once the pre-trial publicity occurred, any and whatever remedial steps Judge Newman undertook short of dismissing the charges would be legally defective.[15] The test, however, is not whether publicity has reached the eyes or ears of the jury, but whether substantial and incurable prejudice has resulted. *United States* v. *D'Andrea*, 495 F.2d 1170, 1172 (3d Cir. 1974) (per curiam) (a case where the Third Circuit affirmed a conviction even though a juror and an alternate had read in the newspaper that the defendant was a "gang figure" and a "reputed underworld figure"). *See also, Murphy*

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[13] Hearing, at p. 120 *et. seq.*

[14] Twelve jurors and two alternates.

[15] In the hearing on October 5, 1976, Judge Newman repeatedly pressed the defendant, with little avail, to state what remedy he sought from jury contamination short of outright dismissal of the charges. (Hearing, p. 129-132).

v. *Florida*, 421 U.S. 794 (1975). Judge Newman had several alternatives once it was learned that three jurors read of the change of plea, one of which was to explore their ability to continue to serve impartially. He gave Mase, however, his choice of remedies. Mase chose a mistrial, which the Court clearly was empowered to do. *Parker* v. *United States*, 507 F.2d 587, 588-89 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). Once the mistrial occurred, selection of the site of retrial was cerainly within the Court's discretion.[16] Judge Newman then had to allow for the chances of picking an impartial jury in New Haven in the near future. On several occasions, he set out the difficulties in returning the case to New Haven after a continuance.[17] Mase seeks to overcome the great burden he has in showing an abuse of that discretion merely by arguing that the Court had no power to reset trial outside the County of New Haven—the site both of the crime and his residence—to a site (Hartford) where New Haven residents would not be part of the jury pool. In *Zicarelli* v. *Gray*, 543 F.2d 466, 479 (3d Cir. 1976), the Third Circuit laid this claim to rest, despite the fact that its discussion of federal venue was by way of illustration in dealing with a state question:

> "Several general principles should be kept in mind as we analyze the specific situation before us. A defendant may not be tried, over objection, in a federal judicial district other than the one in which

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[16] *See, e.g., United States* v. *Anguilo*, 497 F.2d 440, 441 (1st Cir. 1974), *cert. denied*, 419 U.S. 896 (1974). While *Anguilo* involved the permissable transfer of a case to another district, the rationale for exercising judicial discretion *within* the district is the same.

[17] One difficulty was that the newspapers would only pick up where they left off when trial resumed. (Hearing, p. 137). Another was that any New Haven panel, from whom a new jury would be selected, would contain overlap with jurors having previous exposure to the Mase case (Tr. 31).

> the crime was committed, but there is no constitutional right to have the jurors drawn from the entire district. Nor does a defendant have a constitutional right to be tried in the place of his residence. When a federal judicial district has been carved into divisions, the accused has no right to a trial held in a particular division, even the one where the crime occurred, since the constitutional guarantee is written in terms of districts. Beyond these general propositions it must also be noted that New Jersey consists of one judicial district."

According to Mase, *Zicarelli* is not controlling because it did not directly discuss the alleged right of a defendant to select jurors who are residents of the city where the crime occurred. This argument ignores the fact, however, that the trial was transferred to Hartford only because the *defendant* requested a mistrial in the first place, which left the Court with the obligation of curing the publicity from which the request arose. The defendant could have requested the Court to determine if the New Haven jury could have continued impartially, an affirmative answer to which would have kept the trial in New Haven. Defendant's later request to go back to New Haven, once he got to Hartford, was simply an attempt to work both sides of the same issue. Moreover, if Judge Newman had the power, as he did, to remove the case to another district,[18] he certainly had the power simply to move it upstate. Finally, the defendant failed to establish, or even to allege, that New Haven residents were more likely to provide a fair trial of this case than their Hartford neighbors. *See, Zicarelli, supra,* at p. 474, for a similar feature. Prejudice must be shown. In *United*

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[18] *See* Rule 21(a), F.R. Cr. P.

States v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973) this Circuit expressed disapproval of a trial that was held simply for the trial court's convenience on Long Island rather than in Brooklyn, both of which are in the Eastern District of New York. Even so, the Court reaffirmed the constitutional right of the defendant to a trial only in the district of offense and further observed that the defendant had shown no prejudice to trial in Long Island. Implicit throughout the *Fernandez* decision, e.g., at p. 730, is the belief that the interests of justice under other circumstances could warrant trial in the district, but not the division, of offense.

III.

The Consumer Protection Act (18 U.S.C. § 891-894) Is Constitutional On Its Face And As Applied To The Facts Of This Case.

Defendant states two attacks against the constitutionality of Sections 891-894, Title 18, United States Code: that those sections are unconstitutionally vague and in violation of free speech and that the application of Section 894 to the factual circumstances of this case is an unconstitutional extension of federal jurisdiction. Recognizing that this Circuit has rejected the free speech attack,[19] defendant argues only the latter argument.

In a nutshell, defendant contends that Section 894 is unconstitutional insofar as it is construed to encompass the use of extortionate threats to collect a loan by persons other than "loansharks" i.e. persons engaged in the practice of making usurious loans. As the premise for this

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[19] *United States* v. *DeStafano*, 429 F.2d 344, 346-347 (2d Cir.), *cert. denied*, 402 U.S. 972 (1971).

argument, Mase claims in his brief that there was no evidence that he engaged in any loansharking activity.

The short answer to defendant's legal claim is that this Court rejected it in *United States* v. *Schwartz*, — F.2d — (2d Cir.), Slip Op. 341 (January 25, 1977). In *Schwartz, supra*, the two defendants used threats and an arson designed to compel a victim to pay past bills on a truck lease agreement. The defendants contended that Section 894 applied only to organized crime activities. This Court disagreed, holding that it was sufficient, merely for the government to show that the defendants used extortion to collect an existing debt. There was no evidence, as Mase would argue there must be, that the defendants in *Schwartz* were loansharks or had made a loan with usurious rates. The deft in *Schwartz* was a default on a legitimate leasing agreement. *See also*, *United States* v. *Sears*, 544 F.2d 585, 586 (2d Cir. 1976). The defendant admirably concedes that in other Circuits, especially the Third, the law is against him.[20] Moreover, Mase's definition of "loansharking" is too narrow. When the Supreme Court in *Perez* v. *United States*, 402 U.S. 146 (1971) upheld the constitutionality of the Consumer Credit Protection Act, it did not, at p. 147, limit its applicability to "loansharks". The Court said that the petitioner *was* a loanshark who was engaged in precisely

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[20] *United States* v. *Keresty*, 465 F.2d 36, 41 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972); *United States* v. *Largent*, 545 F.2d 1039, 1042 (6th Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3571 (February 22, 1977); *United States* v. *Schaffer*, 539 F.2d 653, 654 (8th Cir. 1976); *United States* v. *Andrino*, 501 F.2d 1373, 1377 (9th Cir. 1974); *United States* v. *Annerino*, 495 F.2d 1159, 1164-1165 (7th Cir. 1974). The defendant, Brief at p. 27, concedes that the Third Circuit in *Keresty* rejected the precise constitutional claim he now makes. The denial of certiorari by the Supreme Court would seem to indicate the continued merit of the claim.

the type of organized crime activity Congress sought to reach. In this case, as Judge Newman held in remitting the defendant to the custody of the government after the jury's verdict, the defendant engaged in classic enforcer-type acts whereby a debtor, no longer able to pay his creditor, suddenly finds himself "visited" by a strongarm man who uses threats of violence and who insists on large interest payments above and beyond the principal owed. This is loansharking. The demands against Dwyer to pay $400 weekly in interest payments, coupled with such remarks by co-defendant Gianotti as "Don't run from these people", and "They're crazy", is evidence enough of the same type of activity outlawed in *Perez, supra.*

IV.

The Loss Of A Gambling Wager To A Bookmaker, Whereby The Bettor Owes To The Bookmaker The Amount Of Money Wagered, Is An Extension Of Credit Within The Meaning Of Section 4.

The evidence showed that Dwyer, the bettor, placed a series of wagers with Gianotti on the weekend of June 5-6, 1976, which caused Dwyer to drop from $1,600 ahead to $4,000 in the red. Mase claims that such a transaction, wherein no money was actually "loaned" to the victim, is not an "extension of credit" within Section 891(1).[21] He argues that while a debt may have arisen when Dwyer lost his bets on June 6, the alleged lack of

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[21] "To extend credit means to make or renew any loan, or enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt, or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

further contact between Gianotti and Dwyer wherein it was agreed to defer payment, prevented an extension of credit from existing.[22]

It would have been remarkable, to say the least, if Dwyer testified that he and Gianotti, a bookmaker, expressly agreed to "defer payment" at the time the wagers were placed and that, thereafter, Gianotti said, in effect, to Dwyer, "Don't forget, payment is deferred". Obviously, from the evidence, Dwyer was not required to tender immediate payment;[23] the fact that Gianotti did not expect immediate payment is evidenced by his conversation the following week with Dwyer when he warned Dwyer that "serious people" were involved. In *United States* v. *Briola*, 465 F.2d 1018, 1021 (10th Cir. 1972) the Tenth Circuit held that gambling debts such as Dwyer's are extensions of credit. After holding that Section 891 was "not limited in its terms to a loan in the sense of money passing", *id.*, the Tenth Circuit needed no more authority than the plain words of the staute, plus the Supreme Court's finding in *Perez*, *supra*, that bookmaking is linked to extortionate activities, to hold that bookmaking debts are extensions of credit. The language of Section 891(1) is no less compelling in this case than it was in *Briola*, *supra*.[24]

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[22] *See* defendant's Brief, at p. 30-31.

[23] Compare, for example, the requirement at a race track that a bettor place the amount of his wager with the track at the time of wagering and the requirement of the track to pay winnings immediately on demand—situations clearly not covered by Section 894—with wagers telephoned into a bookie. In the latter instance, immediate payment is physically impossible.

[24] Defendant also complains that he was entitled to a Court charge to the jury that it could not find that Dwyer's gambling debts were "loans" within the statute. The trial court charged that the jury could find that the debts were extensions of credit if the jury found a loan or an agreement to defer. This correctly charged the law.

V.

The Trial Court Correctly Refused To Strike Testimony Of F.B.I. Agents Who Destroyed Notes And Correctly Admitted Into Evidence A Recorded Conversation Of A Co-defendant Occurring After Mase's Arrest.

(A) As a predicate to authenticating tape recordings made by or with the assistance of the victim on June 22, 1976 two F.B.I. agents testified about the steps they took to attach recording devices to Dwyer's person and telephone. After their day's work was concluded, the agents made rough notes of their activities; these notes were typed onto "Form 302" reports and then discarded. The original recordings, the original devices and the victim's own testimony as to the events of June 22 were all presented to the jury. The extremely brief and simple Form 302 reports in issue here, which do not purport to reflect anything more than the physical acts of the agents in installing the devices, are now attacked because the original handwritten notes were destroyed.[25] A review of defendant's cross-examination of Special Agent Puckett (Tr. 61-62) and Special Agent Slifka (Tr. 95-96) indicates, however, that he was satisfied to establish only that the agents' notes were destroyed; he did not "develop this issue", i.e. possible prejudice, even with the Court's expressed permission to do so. To be sure, there have been cases where a Circuit Court has held that destruction of rough notes is improper. *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*,

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[25] A third F.B.I. agent, who conducted surveillances of Mase earlier on June 22, before the defendant reached the victim's home, retained his notes.

524 F.2d 421 (D.C. Cir. 1975).[26] Usually, the issue becomes of concern where the destroyed notes reflected an interview of the defendant himself, *Harris, supra*, although destruction of notes of interviews of eye-witnesses has also caused problems. *Harrison, supra.* On the other hand, this Circuit has a long line of cases holding that the Jencks Act "imposes no duty on the part of law enforcement officers to retain rough notes when their contents are incorporated into official records and they destroy the notes in good faith". *United States* v. *Terrell*, 474 F.2d 872, 877 (2d Cir. 1973). Defendant, in this case, makes no allegation or effort to show that the agents' notes were intentionally destroyed in bad faith or were substantially different in content than the Form 302 report. *Terrell*, at p. 877. Moreover, the notes requested by the defendant related to such straightforward, unambiguous activity that there is no reason whatever to suspect that the formal reports inaccurately reflected what the agents did. Even assuming, therefore, a duty of the agents to retain notes of this kind no substantial right of the defendant to explore the truth was affected.

(B) The defendant claims that Gianotti's telephoned threats against Dwyer on June 22, 1976, after (but unknown to Gianotti) Mase's arrest less than an hour earlier, was inadmissible against Mase on the conspiracy charge and caused prejudicial spillover into the substantive charge for which Mase was convicted.[27] To review the facts briefly, after Mase was arrested, Gianotti called Dwyer and told Dwyer, in substance, that he (Dwyer)

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[26] *Harrison*, at p. 431-432, fn. 25, lists dozens of citations of other courts that have dealt with the destruction of rough notes. That court, while disapproving of the practice, concluded that prejudice invariably turns on the particular facts of a case.

[27] The jury reported itself deadlocked on the conspiracy charge.

would get hurt physically if he didn't pay what he presently owed or arrange somehow with Mase to pay interim interest of $400 per week.[28] Judge Newman limited the admissibility of this conversation to the conspiracy count as a "verbal act", i.e. a threat tending to prove the existence of the conspiracy (Tr. 501-502). The jury was instructed not to consider the statement as actual proof of what would happen to Dwyer for a continued failure to pay. *Id.*

Judge Newman's charge was more generous to the defendant than he deserved. Given Dwyer's testimony as to the Mase-Gianotti relationship prior to June 22, the Gianotti threat of June 22 was admissible for the truth of the matter contained therein as a statement in furtherance of the conspiracy, on Count One, and in furtherance of a joint venture, for which each defendant was indicted individually in Counts Two and Three. Mase showed no indication nor made any effort between the time of his arrest and Gianotti's telephone call to withdraw from the conspiracy or make a clean breast to the authorities. *See, United States* v. *Borelli*, 336 F.2d 376, 389 (2d Cir.), *cert. denied*, 379 U.S. 960 (1965); *United States* v. *Agueci*, 310 F.2d 817 (2d Cir.), *cert. denied*, 372 U.S. 959 (1963). The jury was certainly entitled to find that the Gianotti call, in relation to Mase's visit, was no

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[28] The defendant asserts that Dwyer "elicited" the threats from Gianotti. The conversation speaks for itself. See defendant's Appendix p. A. 55, *et seq.* The jury was entitled to find, in addition, from Dwyer's testimony that Mase had already threatened Dwyer on several occasions prior to June 22 and that Gianotti was acting as a buffer between Dwyer's reluctance to pay and Mase's extortionate demands. Even without the Gianotti conversation, therefore, the evidence in a light most favorable to the government was more than sufficient to convict Mase on Count One. *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

coincidence but part and parcel to a common plan utilizing both the carrot and the stick and that the plan was still continuing as of Gianotti's call.

In any event, the limited admission of the Gianotti call as a verbal act was proper. The statement was clearly independent evidence of Gianotti's association with Mase's prior attempts to collect a debt.[29] *See, United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Gianotti's threats during the conversation all directly concerned the debt in issue. Mase concedes, Brief at p. 39, that the conversation was admissible as a verbal act against him if probative of the conspiracy's existence, but goes on to claim that the conversation was not evidence of the conspiracy to collect the debt of June 6, but only evidence of threats of what harm would follow if Dwyer failed to renegotiate the terms of the loan. Gianotti, however, did no more than carry Mase's prior threats to the next logical step: either Dwyer agreed to pay penalty interest payments or he'd get killed; if he did nothing at all he'd get killed. The mere fact that a suggested alternative (to getting killed) involved getting further loans or advances hardly sets the conversation apart from the previous efforts to collect.

Finally, the jury's conviction on Count One does not create a presumption of prejudice because the Gianotti call was admitted. The evidence against Mase on the substantive count was overwhelming. Mase's threats himself, recounted by Dwyer, were of the same nature as Gianotti's and occurred on three separate occasions. The

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[29] The conversation begins:

"Gianotti: How'd you make out?
Dwyer: Ah, I didn't pay him.
Gianotti: Oh, my God."

jury could hardly have been overwhelmed or shocked because Gianotti finally got into the act, as evidenced by the fact that they did not convict on the conspiracy count.

CONCLUSION

The judgment of conviction below should be affirmed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-1009

UNITED STATES OF AMERICA

Appellee

v.

EDWARD V. MASE

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 24th day of March, 1977, deponent served the within Brief for the Appellee upon Jacob D. Zeldes, Esq.; Zeldes, Needle, & Cooper Lafayette Plaza Tower, 333 State Street Bridgeport, Connecticut 06603

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 24th day of March 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977